No. 88-2018 (6)



In The

# Supreme Court of the United States

October Term, 1989

THE STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois First District**

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

I.

Whether a police officer's good faith reliance on a third party's apparent authority to permit a consensual entry is a valid exception to the warrant requirement of the Fourth Amendment, in the alternative, whether the good faith exception to the exclusionary rule should be applied.

II.

Whether Gale Fisher possessed actual authority under *United States v. Matlock* to permit a consensual entry.

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## BRIEF FOR PETITIONER

## OPINION BELOW

The Order of the Illinois Appellate Court, First Judicial District is unreported and is reproduced in the Joint Appendix to this Brief at 98. Report of Proceedings containing the trial court's findings on respondent's motion to quash arrest and suppress evidence is not reported and is reproduced in the Joint Appendix to this Brief at 93. The Order of the Illinois Supreme Court of April 5, 1989 denying petitioner's Petition for Leave to Appeal is reported at 125 Ill.2d 572 (1989).

## JURISDICTION

The order of the Illinois Appellate Court, First Judicial District was entered on January 11, 1989. A timely Petition for Leave to Appeal was denied by the Illinois Supreme Court on April 5, 1989. 125 Ill.2d 572 (1989). The Petition for a Writ of Certiorari was submitted on June 5, 1989, and was granted by this Court on October 30, 1989. This Court's jurisdiction is invoked under U.S.C., section 1257(3).

## CONSTITUTIONAL PROVISION AT ISSUE

### Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. *Procedural History*

Respondent, Edward Rodriguez, was charged by information in the Circuit Court of Cook County with possession of more than 30 grams of cocaine, in violation of Ill. Rev. Stat. 1983, ch. 56½, sec. 1401(A2). He was also charged with possession of more than 30 grams but less than 500 grams of cannabis in violation of Ill. Rev. Stat. 1983, ch. 56½, sec. 704(D). (Tr. 166-167) Prior to trial, respondent filed a motion to quash arrest and suppress evidence. Respondent alleged that his warrantless arrest was invalid. Specifically, he claimed that the consent to enter the premises where he was arrested was ineffective because the consenter, Gale Fisher, had no authority to permit the entry by police officers. (Tr. 178)



At the hearing on the motion to quash arrest and suppress evidence, which was conducted on August 18, 1986, petitioner asserted that Gale Fisher possessed both the actual as well as the apparent authority to consent to the police entry. Accordingly, petitioner maintained that such entry did not violate respondent's Fourth Amendment rights. The trial court held that Gale lacked actual authority to consent to the police entry. The court also rejected an apparent authority to consent doctrine. Thus, the trial court found that respondent's Fourth Amendment rights had been violated and granted the motion.

Petitioner filed an interlocutory appeal to the Appellate Court of Illinois, which stayed any further proceedings in the trial court. Petitioner again maintained that Gale Fisher not only possessed the actual authority to consent to the police entry but that even if she lacked actual authority to consent, the police officers reasonably relied on her apparent authority to consent to the entry. The Illinois Appellate Court, in an unpublished opinion, held that Illinois cases have interpreted the Fourth Amendment as prohibiting an apparent authority to consent doctrine. The court also held that Gale Fisher lacked sufficient common authority over the premises in question to validate her consent to enter. Petitioner's subsequent Petition for Leave to Appeal these issues to the Illinois Supreme Court was denied.

B. *Facts*

On July 26, 1985, at about 2:30 p.m. Chicago Police Officers James Entress and Ricky Gutierrez received a radio call from another officer instructing them to proceed to a residence at 3554 S. Wolcott in Chicago, Illinois. (J.App. 3-4) The officers were met there by Gale Fisher. Gale told them that earlier in the day respondent, Edward Rodriguez, had beaten her at "their apartment at 3519 S. California." (J.App. 6) Officer Entress noticed that Gale's jaw was swollen, she had a black eye and bruises on her neck. He stated, "She looked like she was the victim of a beating." (J.App. 32) In fact, it was subsequently determined that Gale had sustained a broken jaw. (J.App. 32)

Officer Entress testified that Gale also told them that she wanted to sign a complaint and that all her clothes and furniture were at the apartment on California Avenue. (J.App. 6, 25) She told Officer Entress that she had been living with respondent at that apartment. (J.App. 10, 11, 25) Gale also told the officers that she had her own key and would open the door for them in order to arrest respondent, whom Gale believed was sleeping in the apartment. (J.App. 6)

At the suppression hearing, Officer Entress was asked if he had testified at a preliminary hearing on September 11, 1985 that, "She [Gale] stated she used to live there." (J.App. 10) Officer Entress agreed that he had so testified, but stated at the hearing on the motion to suppress that Gale's exact words were that, "She had been living there." (J.App. 11) Gale kept using the word "our" apartment, when referring to 3519 S. California Avenue. (J.App. 26-27) Officer Entress was never told that



Gale had been living with her mother prior to the beating. (J.App. 11-12)

After the initial conversation with Gale, the officers as well as Gale and her mother, Dorothy Jackson, proceeded to 3519 S. California. Gale walked up to the door, opened the door with a key and allowed the officers to enter the apartment. (J.App. 13) Officer Entress testified that Gale stated it was her key. (J.App. 6, 10, 16, 26) Gale and her mother returned to the police vehicle, while the officers entered the apartment. The officers noticed a bed in the middle of the room. (J.App. 17) There were drug paraphernalia such as scales and pipes that were scattered on the bed. (J.App. 28)

Officer Entress testified that in order to enter the bedroom, they had to walk past some tupperware that was uncovered and in plain view. (J.App. 21) The officer noticed a white powder inside the tupperware that he suspected to be cocaine. (J.App. 28) At that time, the officers did not pick up or handle anything. Instead, they proceeded directly into the bedroom where respondent was sleeping. (J.App. 18-19) As the officers were attempting to awaken respondent, they saw two open briefcases by the side of the bed. (J.App. 19, 21, 29) Inside these attache cases were clear plastic bags containing a white substance that was similar in appearance to the substance they had just seen in the tupperware in the living room. (J.App. 28)

Upon awakening, respondent asked the officers if he could get his money from a dresser drawer in the front room. Respondent opened the drawer and Officer Entress

saw $452.00 and another clear packet containing a white substance. (J.App. 30)

Respondent was transported to the police station where the officers then inventoried the evidence collected at the apartment. This evidence included the controlled substance and cannabis sativa. (J.App. 20, 31) Gale subsequently signed a battery complaint against respondent. (J.App. 31)

Testifying on behalf of petitioner, Dorothy Jackson, Gale's mother, stated that she lived at 3554 S. Wolcott in Chicago. She specifically stated that she lived by herself. (J.App. 35) Ms. Jackson further testified that on July 26, 1985, Gale came to Ms. Jackson's apartment and told Ms. Jackson that respondent had beaten her. (J.App. 45-46) Ms. Jackson noticed that Gale had a black eye and a swollen jaw. (J.App. 46) Ms. Jackson confirmed that when Officers Entress and Gutierrez arrived, Gale told them that respondent had beaten her up. (J.App. 48) Ms. Jackson further testified that in Gale's conversation with the police officers she referred to the apartment at 3519 S. California as "our apartment" and never as "his apartment." (J.App. 52) Ms. Jackson, in her testimony, referred to 3519 S. California as Gale's home. (J.App. 52) Dorothy Jackson also corroborated that Gale opened the door to the apartment at 3519 South California with her own key and allowed the officers to effectuate respondent's arrest. (J.App. 50) Ms. Jackson stated that Gale never told the officers that "she used to live there" or that she did not live at 3519 South California anymore. (J.App. 57)

Dorothy Jackson further testified that on July 1, 1985, Gale brought her children to Ms. Jackson's home and





asked her mother to help move clothes from her apartment at 3519 S. California. They drove to Gale's apartment. Gale opened the door with her key and told her mother to wait so she could get some clothes for the children and herself. She brought two or three baggies, "what ever she could grab real fast." (J.App. 39) Gale left behind all the rest of her personal belongings, including a stove, a refrigerator, a table, chairs, a sofa-bed, the childrens' bed, a dresser, personal bills and china given to Gale by her grandmother. (J.App. 40)

Gale told her mother that she left because respondent wanted the baby to be weaned from her bottle and her other daughter toilet trained. (J.App. 41) After the girls were trained, Gale was to return to her apartment. (J.App. 41) Gale frequently returned to her California Avenue apartment and did not always return to her mother's apartment during the interval of July 1 to July 26. (J.App. 44) When Gale was at her mother's residence, she slept on a coach.

Gale Fisher testified on behalf of respondent. She stated that on July 1, 1985, she moved in with her mother, but prior to that date she lived at 3519 S. California. (J.App. 62-63) She had lived there since December, 1984 with her children. (J.App 68) Gale claimed that when she left she did not have a key to the apartment. (J.App. 64) Between July 1 and July 26 she saw respondent almost every day at the California Avenue apartment and sometimes she spent the night there. (J.App. 73) Gale conceded that she left all her furniture, childrens' furniture and china at the California Avenue apartment. (J.App. 69-70, 72) The only thing that she moved out of the apartment between July 1 and July 26 was clothing. (J.App. 72)

Gale testified that she spoke to police officers on July 26, 1985 at her mother's home and she admitted that she told the officers that she had a key to the apartment on California Avenue and that she would use it to let them enter the premises. (J.App. 77-78) Gale also admitted that she accompanied the officers to the California Avenue apartment and opened the door with the key. (J.App. 78) However, Gale alleged that she took the key from respondent's dresser earlier that day just after respondent beat her. She said respondent had not given her permission to take the key. (J.App. 66) On cross-examination, Gale was asked if she had testified at the preliminary hearing that respondent had given her the key. (J.App. 80) She said she could not remember, but it was stipulated that she in fact had so testified.

Gale testified that subsequent to the July 26th beating, respondent beat her again. This time he hit her in the face with his fist, fracturing her cheekbone in four places. (J.App. 82) Gale admitted fearing respondent at times. (J.App. 82) The court asked Gale why she took the key on July 26th and did not take it on any prior occasion. Gale claimed that during the argument, the doors to the California Avenue apartment were locked and a key was needed to open the door from the inside. (Tr. 99) However, on redirect examination, Gale admitted that on the date of the July 26th argument, respondent had actually let her out of the apartment, but she wanted the key in case "he ever did that again." (Tr. 100)

Examination by the trial judge also elicited the following testimony from Gale: her name was not on the lease for the apartment, she did not contribute to rent payments in June or July (Tr. 100-101) – although she did



use her check to pay for their bills and groceries – she never invited friends to the apartment and she never went to respondent's home when he was not there. (Tr. 102)

The trial court held that Gale did not have the actual authority to consent to the police officers' entry of the apartment on California Avenue. The court based its decision on its finding that Gale's name was not on the lease, she did not contribute to the rent, it was not her exclusive or usual place of residence, she did not have access when respondent was not there, she never brought people there and she moved her clothes and children to her mother's home. The Illinois Appellate Court agreed and noted further that Illinois cases had interpreted the Fourth Amendment as prohibiting an apparent authority to consent doctrine.

## SUMMARY OF ARGUMENT

The Fourth Amendment only prohibits unreasonable searches and seizures. It is well-established that a search based on the valid consent of a third party is not unreasonable and, therefore, does not violate a defendants' Fourth Amendment rights. *United States v. Matlock*, 415 U.S. 164 (1974). When police officers, in good faith, reasonably rely on objective facts and circumstances which indicate that a third party possesses sufficient authority over the premises to give valid consent to enter, the ensuing entry is not unreasonable and no warrant should be required by the Fourth Amendment. The propriety of

this doctrine, which has been termed apparent authority to consent, was specifically left open in *Matlock*.

The entry of 3519 South California by police officers in the case at bar was proper under the Fourth Amendment because the objective facts presented to the officers supported their reasonable belief that Gale Fisher possessed actual authority to consent. The officers knew that Gale had been beaten by respondent at 3519 South California which Gale referred to as "our" apartment. Gale told them that all of her possessions were at that apartment and that she had a key to allow them entry. Gale said it was "her" key and she opened the door for the officers in order to effectuate the arrest of respondent. Moreover, all of their information was corroborated by an independent witness, Dorothy Jackson, Gale's mother. Based on these facts, any reasonable police officer would have concluded that Gale had the necessary authority to consent to the entry of the premises.

Alternatively, even if this Court were to hold that the Fourth Amendment does not provide for the apparent authority to consent doctrine and that the warrant requirement is not excused, exclusion of the evidence is an inappropriate remedy. Where, as here, police officers, in good faith, reasonably rely on objective facts and circumstances, which indicate that a third party has the authority to consent to an entry, the good faith exception to the exclusionary rule should be applied. *United States v. Leon*, 468 U.S. 897 (1984). Since there was no misconduct on the part of the police officers in this case, exclusion would only serve to discourage police officers from conducting valid consensual searches.



Petitioner also contends that the Illinois Appellate Court misapplied *Matlock* to the facts of the instant case when it held that Gale Fisher did not possess common authority to consent to the police entry. At the time of the entry, Gale was living with her mother on a temporary basis. The fact that all of her possessions including appliances, furniture and personal effects, such as her grandmother's china, remained at 3519 South California strongly support the conclusion that Gale had not abandoned the premises but rather had mutual use and joint control for most purposes. This conclusion is further supported by her possession of the key. In short, the Illinois Appellate Court misapplied *Matlock* by relying on property concepts in determining the existence of common authority.

## ARGUMENT

### I.

### THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHEN A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY. IN THE ALTERNATIVE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IF THE WARRANT REQUIREMENT IS NOT EXCUSED.

### A.

### Since Reasonableness Is The Touchstone Of The Fourth Amendment, The Warrant Requirement Should Be Excused Where The Objective Facts And Circumstances Indicate That Police Officers Have Reasonably Relied On A Third Party's Apparent Authority To Consent to An Entry.

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that consent is a valid exception to the Fourth Amendment warrant requirement. In *United States v. Matlock*, 415 U.S. 164 (1974), this court further held that consent may be obtained from a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected. 415 U.S. at 171. The case at bar presents the question explicitly left open in *Matlock*, that being whether the police officers reasonably believed that a third party had sufficient authority over the premises to render valid consent. 415 U.S. 164, 177 n.14. If a police officer reasonably relies on objective facts and circumstances which indicate that a



third party possesses a sufficient relationship to the premises to give valid consent to enter, the Fourth Amendment warrant requirement should be excused.

The overwhelming majority of both state and federal courts that have reached the issue have fully embraced this proposition which has come to be known as the apparent authority to consent doctrine.[1] Properly

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[1] *Nix v. State*, 621 P.2d 1347 (Alaska, 1981); *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982); *Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); *People v. Jacobs*, 43 Cal. 3d 472, 233 Cal. Rptr. 323, 729 P.2d 757 (1987) (en banc); *People v. Berow*, 688 P.2d 1123 (Colo. 1984); *Jackson v. United States*, 404 A.2d 911 (D.C. App. 1979); *Flanagan v. State*, 440 So. 2d 13 (Fla. App. 1983); *Commonwealth v. Wahlstrom*, 375 Mass. 115, 375 N.E.2d 706 (1978); *People v. Gary*, 150 Mich. App. 446, 387 N.W.2d 877 (1986); *People v. Wagner*, 114 Mich. App. 541, 320 N.W.2d 251 (1982); *Snyder v. State*, 738 P.2d 1303 (Nev. 1987); *State v. Miller*, 159 N.J.Super. 552, 388 A.2d 993 (1978); *People v. Adams*, 53 N.Y.2d 1 (1981); *State v. Bailey*, 276 S.C. 32, 274 S.E.2d 913 (1981); *State v. No Heart*, 353 N.W.2d 43 (S.D. 1984); *State v. Elphee*, 1989 Tenn. Crim. App. Lexis 163 (March 7, 1989); *McNairy v. State*, 777 S.W.2d 570 (Tex. App. Austin, 1989); *State v. Christian*, 613 P.2d 1199 (1980), aff'd., 95 Wash, 2d 655, 628 P.2d 806 (1981). In addition, Federal Circuit Courts of Appeals have also adopted this doctrine. They include *United States v. DiPrima*, 472 F.2d 550 (1st Cir. 1973); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975); *United States v. Rodriguez*, Slip op. No. 88-2952 (7th Cir., November 1, 1989); *United States v. Sells*, 496 F.2d 912 (7th Cir. 1974); *United States v. Hamilton*, 792 F.2d 837 (9th Cir. 1986); *United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981). Compare: *State v. Logan*, 617 S.W.2d 433 (Mo. App. 1981). Contra: *State v. Carsey*, 295 Or. 32, 664 P.2d 1085 (1983); *State v. Matsen*, Ohio Court of Appeals, Slip op. (September 29, 1989) (1989 Ohio App. Lexis 3723).

interpreted, the Fourth Amendment would excuse the warrant requirement when police officers rely on a third party's apparent authority to consent to an entry. The test for apparent authority should be whether the police, acting in good faith, reasonably believe that the third party possesses the requisite authority to consent. This test ignores the subjective beliefs of the officers, and looks to objective facts which the officers relied upon in concluding that the third party possessed sufficient authority to consent.[2]

The facts of this case clearly support a determination that Officers Entress and Gutierrez reasonably believed that Gale Fisher possessed the requisite authority to consent to their entry at 3519 South California Avenue in order to arrest respondent, Edward Rodriguez. The officers were called to the house of Dorothy Jackson, Ms. Fisher's mother. At the suppression hearing, Officer Entress testified that Gale Fisher told him the following:

> She stated Edward Rodriguez earlier in the day had beaten her at their apartment at 3519 S. California. She stated that she wanted to sign complaints. That all her clothes and her furniture were in that apartment and that she had her own key for the apartment. That she would open the door and allow us to go into arrest Eddie Rodriguez who was at the apartment at the time and she felt he was sleeping. (J.App. 6)

[2] In using the term good faith in this section, petitioner is not referring to the good-faith exception to the exclusionary rule that was announced in *United States v. Leon*, 468 U.S.897 (1984). Petitioner's main contention is that since the Fourth Amendment provides for apparent authority to consent, respondent's Fourth Amendment rights have not been violated and thus, the exclusionary rule is inapplicable. The issue of whether the good faith exception to the exclusionary rule should be applied if the Fourth Amendment does not provide for apparent authority is discussed in Section B.



Dorothy Jackson confirmed that, in fact, her daughter had referred to the apartment at 3519 South California as "her home" as well as "our apartment" when talking to the police officers. (J.App. 52) Officer Entress testified that Gale Fisher repeatedly used the word "our" when referring to the apartment at 3519 South California. (J.App. 26)

After deciding that she indeed wanted to press charges against respondent, Gale, Dorothy Jackson and the police officers proceeded to 3519 South California. Gale took out her key, opened the door to the apartment and allowed the officers to enter. According to Officer Entress, Gale stated that this was her key. (J.App. 6, 9, 16, 26)

The police officers were thus faced with a woman who had been severely beaten; Gale Fisher had a swollen jaw, a black eye and bruises on her neck. (J.App. 32) Gale told the officers that her live-in boyfriend was responsible and volunteered to take the officers to what she termed "our" apartment. Moreover, she told the officers that all her clothes and furniture were at the apartment at 3519 South California. Upon arriving at the residence, Gale produced a key which she referred to as hers, and allowed the officers to enter to effectuate the arrest. The beating in fact took place at that same apartment.

Based on these objective facts and circumstances, any reasonable police officer would have concluded that Gale Fisher possessed the actual authority to permit the entry. This is especially true where all of this information was

corroborated by an independent witness, Dorothy Jackson. Moreover, the officers had no reason to question Gale's possession of the key. The officers were not told that Gale had also been staying at her mother's apartment prior to the beating.

In interpreting the Fourth Amendment, this Court has long held that its guiding determination is reasonableness. Indeed, it is the touchstone of the Fourth Amendment that only unreasonable searches and seizures are to be prohibited. In analogous circumstances, this Court has ruled that a search based on a good faith mistake of fact is not unreasonable. *Hill v. California*, 401 U.S. 797 (1971); *Maryland v. Garrison*, 480 U.S. 79 (1987).

In *Hill*, this Court was faced with a situation where police officers possessed probable cause to arrest the defendant. When the officers arrived at defendant Hill's residence, they arrested a person whom they believed to be defendant, but who later turned out to be defendant's accomplice, Miller. Incident to this arrest, a subsequent search of Hill's residence turned up evidence that formed the basis for defendant's armed robbery conviction. In upholding the denial of defendant's motion to suppress, this Court stated:

> The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the



> arrest a reasonable response to the situation facing them at the time.

461 U.S. at 805-806.

Thus, in *Hill*, notwithstanding the officers' mistake, the Court upheld the application of the search incident to arrest exception to the warrant requirement due to the reasonableness of their conduct. Moreover, in *Maryland v. Garrison, supra*, this Court held that the underlying rationale in *Hill* was "equally applicable to an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched." 480 U.S. at 88. Likewise, an arrest based on an officer's reasonable determination that a third party possessed the requisite authority to permit a consensual entry should not be proscribed by the Fourth Amendment if it is subsequently determined that the third party, in fact, lacked sufficient authority to consent.

This interpretation is also consistent with the analogous line of cases that have determined the standard for assessing probable cause to arrest under the Fourth Amendment. For instance, in *Brinegar v. United States*, 338 U.S. 160 (1949), the Court stated:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts

> leading sensibly to their conclusions of probability.

330 U.S. at 176.[3]

As noted previously, the vast majority of courts that has addressed this issue has adopted the apparent authority to consent doctrine. *See* n.1, *supra*. Most recently, in *United States, v. Miguel Rodriguez*, No. 88-2952 (7th Cir., November 1, 1989), (no relation to the case at bar) the United States Court of Appeals for the Seventh Circuit noted that the question posed by the Fourth Amendment is whether a search is reasonable and held further that it is reasonable for police officers to act on the basis of apparently valid consent. In *Rodriguez*, defendant's wife consented to an entry of defendant's quarters. Defendant was a janitor at a union hall, who shared an upstairs room with his wife. Prior to his arrest, defendant separated from his wife, moved out of the upstairs room and began residing in the janitors' quarters, which he shared with another janitor. Subsequent to defendant's arrest, Ms. Rodriguez used her key to permit the agents to enter the janitors' quarters.

In upholding the legality of the consent to entry, the Seventh Circuit specifically held that a reasonable

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[3] In *Brinegar*, the Court further stated that:

> In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.

338 U.S. 160, 175 (1949). *See also Illinois v. Gates*, 462 U.S. 213 (1983).



interpretation of the Fourth Amendment would provide for an apparent authority doctrine. The Court stated:

> Mrs. Rodriguez's possession of the key gave her apparent authority to consent. Apparent authority is enough. Just as police may have probable cause to act even though their source was lying, so they may act when the person giving consent has apparent authority. *United States v. Miller*, 800 F.2d 129, 133 (7th Cir. 1986); *United States v. Sledge*, 650 F.2d 1075, 1077-81 (9th Cir. 1981) (Kennedy, J.); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978); *United States v. Peterson*, 524 F.2d 167, 180 (4th Cir. 1975); cf. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (reserving the question). The question posed by the Fourth Amendment is whether the search is "reasonable", and it is reasonable to act on the basis of apparently valid consent.

Slip op. 6.

In *Rodriguez*, the Seventh Circuit Court of Appeals also expressed concern over the dangers engendered by an interpretation of the Fourth Amendment which would not provide for recognition of an apparent authority doctrine. The Court observed:

> Going beneath the surface of the information at hand – whether furnished by an eyewitness, see *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437-41 (7th Cir. 1986), or by a person giving consent – would make the outcome of the search depend on the niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case

> like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

Slip op. at 6.

Police officers should not be required to be legal technicians, but rather, reasonably prudent men and women. They must make on-the-spot judgments in a myriad of difficult situations. *Brinegar, supra,* 338 U.S. at 175. Police officers do not have legal documents such as leases, warranty deeds or affidavits of title at their disposal. They can only be expected to deal with what is apparent to them at the time consent is given. *See Hill, supra,* 401 U.S. at 803-804; *Garrison, supra,* 480 U.S. at 88.

A determination to the contrary would render this Court's decision in *Schneckloth v. Bustamonte, supra,* 412 U.S. 218, a hollow one.[4] A decision rejecting an apparent authority to consent doctrine would not deter police misconduct because there is no wrongdoing when police officers reasonably rely on the objective facts and circumstances available to them. However, rejection of the doctrine could serve to deter the use of consensual searches which are a "wholly legitimate aspect of effective police activity." *Id.* at 228. As the Seventh Circuit stated in *United States v. Miguel Rodriguez, supra,* "Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents. *Nix of Alaska,* 621 P.2d 1347, 1349-50 (Alaska, 1981)." *See* slip op. at 6.

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[4] "In short, a search pursuant to consent . . . properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." 412 U.S. at 228.



The adoption of the apparent authority to consent doctrine is also necessary to conform Fourth Amendment analysis to the significant sociological and cultural changes that have occurred in the fifteen years since this Court issued its decision in *Matlock.* Today, it has become quite common for individuals to enter into fluid, non-marital living arrangements.[5] As such, actual authority can be an extremely elusive concept and one quite unsuited to the exigencies of the various situations now faced by our nation's law enforcement officers on a daily basis.[6]

In sum, whenever a police officer reasonably and in good faith relies on objective facts and circumstances which indicate that a third party possesses a sufficient

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[5] See also, Wayne R. LaFave, *Search and Seizure,* A Treatise On The Fourth Amendment, 2nd ed., vol. 3, 1987, page 260, wherein it is suggested that in *Frazier v. Cupp,* 394 U.S. 731 (1969), there is at least a hint that the valued practice of allowing searches by consent ought not be subjected to unrealistic restraints based upon subtle distinctions in individual living arrangements.

[6] This is not to suggest that a determination by a court of law that actual authority to consent existed should be abandoned. As in *Matlock,* if it is determined that actual authority to consent was in fact present, then there would be no need to analyze whether or not the police officers reasonably relied on the objective facts and circumstances presented to them. Only when a court of law finds actual authority to consent lacking will the determination of the police officers' actions be scrutinized under the apparent authority doctrine. (See Argument II, *infra,* p. 26)

relationship to the premises to give valid consent to enter, the Fourth Amendment warrant requirement should be excused. It was certainly reasonable for Officers Entress and Gutierrez to believe that Gale Fisher in fact possessed the requisite actual authority to consent to their entry. She referred to the premises as our apartment and referred to the key which she used to allow the officers' entry as her key. Gale Fisher quite clearly was the victim of a severe beating which she claimed was administered by respondent at the California Avenue apartment. Where, as here, the police officers' conduct is objectively reasonable, the Fourth Amendment warrant requirement should be excused. As such, the ruling of the Illinois Appellate Court should be reversed.

B.

**If This Court Does Not Recognize Apparent Authority As An Exception To The Warrant Requirement, The Good Faith Exception To The Exclusionary Rule Should Be Applied.**

Assuming that this Court holds that the Fourth Amendment warrant requirement is not excused where police officers reasonably rely on a third party's apparent authority to consent to an entry, the good faith exception to the exclusionary rule should be applied.

In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that the exclusionary rule would not bar the use of evidence in the prosecution's case in chief where the evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and



neutral magistrate, but ultimately found to be unsupported by probable cause. In so holding, this Court recognized that the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Indisputably, the central purpose of the exclusionary rule is the deterrence of police misconduct. In *Leon*, the Court's decision was grounded in its finding that the exclusionary rule could not have any deterrent effect when the offending officers acted in an objectively reasonable manner in obtaining and executing the warrant.

The underlying rationale of *Leon* applies with equal force to the case at bar. Here, the officers in good faith possessed an objective good faith belief that Gale Fisher had common authority over the premises at 3519 South California. Gale Fisher specifically used the word "our" when referring to the premises and her mother referred to it as "her home," i.e., Gale's home. (J.App. 52) In addition, Gale told the officers that her furniture and her clothes were at the apartment. Further, Gale allowed the officers to enter through the front door with what she called "her" key. (J.App. 27) The officers believed they had secured the necessary consent to enter the residence without a warrant and that belief was objectively reasonable.

Just as in *Leon*, the purpose of the exclusionary rule would not be served by suppressing the evidence in this case. When police officers reasonably believe that they

are acting in accord with the Fourth Amendment, there can be no deterrent effect. As this Court observed in *United States v. Peltier*, 422 U.S. 531, 539 (1975), which was cited with approval in *Leon*:

> 'If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. See also *Illinois v. Gates*, 462 U.S. at 260-61, 103 S.Ct. at 2344 (White, J., concurring in judgment); *United States v. Janis, supra*, 428 U.S. at 459, 96 S.Ct. at 3034: *Brown v. Illinois*, 422 U.S. at 610-11, 95 S.Ct. at 2265-66 (Powell J., concurring in part). In short, where the officer's conduct is *objectively reasonable*, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way effect his future conduct unless it is to make him less willing to do his duty. *Stone v. Powell*, 428 U.S. at 539-40, 96 S.Ct. at 3073-74 (White, J., dissenting).' *United States v. Leon*, 468 U.S. 897 at 921. (emphasis added)

Furthermore, in *Illinois v. Krull*, 480 U.S. 340 (1987), this Court held that where police officers reasonably rely on a state statute that is later determined to be unconstitutional, evidence seized during a search made pursuant to such statute should not be subjected to the strictures of the exclusionary rule. In so holding, *Krull* recognized that police officers need only act reasonably under the Fourth Amendment, and reasonableness is to



be measured by the objective facts and circumstances presented at the time of the search. See also *People v. Adams*, 53 N.Y.2d 1, 439 N.Y.S.2d 877, 422 N.E.2d 537 (1981), wherein the New York Court of Appeals specifically recognized that where a police officer reasonably relied on a third party's apparent authority to consent, the exclusionary rule should not apply. Just as in *Leon*, the Court in *Krull* refused to punish reasonable law enforcement activity with the extreme sanction of exclusion. Similarly, application of the exclusionary rule in the case at bar would be equally inappropriate and unwarranted.

Here, the police officers acted in reasonable, good faith, reliance on Gale Fisher's apparent authority to permit their entry. They entered the apartment because they reasonably believed that Gale Fisher possessed common authority. In the future, police officers, faced with similar circumstances will make the same decision when they reasonably believe they have secured valid consent. The only tangible effect of a failure to adopt the apparent authority to consent doctrine will be to deter consensual searches and thereby impair legitimate police activity. It is for this reason that neither the purpose of the exclusionary rule nor the interests of justice would be served by excluding the evidence in this case.

## II.

## WHERE GALE FISHER REFERRED TO THE APARTMENT AT 3519 SOUTH CALIFORNIA AVENUE AS HER APARTMENT, RETAINED POSSESSION OF A KEY TO SUCH APARTMENT WHICH SHE TERMED HER KEY, AND KEPT ALL HER POSSESSIONS EXCEPT THREE BAGS OF CLOTHING AT THE APARTMENT, THE ILLINOIS APPELLATE COURT MISINTERPRETED *UNITED STATES V. MATLOCK* BY FINDING THAT GALE LACKED COMMON AUTHORITY TO PERMIT A CONSENSUAL ENTRY.

In reaching the conclusion that Gale Fisher lacked the authority to consent to the police entry of 3519 South California on July 26, 1985, the Illinois Appellate Court misapplied this Court's holding in *United States v. Matlock*, 415 U.S. 164 (1974). In *Matlock*, this Court held that the consent which is necessary to justify a warrantless search may be obtained from a third party who possesses common authority over the premises sought to be inspected. In explaining the concept of a third party's common authority, the *Matlock* court stated:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint control for most purposes, so that it is reasonable to recognize that any of the cohabitants had the right to permit the inspection in his own right and that the others have assumed the risk that one of their member might permit the common area to be searched. *Id.* 415 U.S. 172, n.7.

In light of this Court's pronouncement of common authority in *Matlock*, the facts in the case at bar support a



determination that Gale Fisher possessed a sufficient relationship to the premises to give valid consent to enter to the police officers. Gale and her two children lived with respondent at 3519 South California from December of 1984 until July of 1985. During that period, Gale testified that her stove, refrigerator, sofa-bed, table and chairs were at the apartment along with a dresser and beds which were used by her children. Gale indicated that her grandmother's china was kept at the apartment as well. The fact that these possessions were used at the apartment at 3519 South California was corroborated by Gale's mother, Dorothy Jackson.

Gale admitted that she had an argument with respondent, had fought with him on other occasions and that respondent would slap her. Gale stated that on July 1, 1985, she took clothing for herself and her children and moved out of the apartment at 3519 South California and in with her mother at 3554 South Wolcott. However, Gale admitted that besides some clothing, everything else that she owned remained at the apartment at 3519 South California. (J.App. 72)

Between July 1, 1985 and July 26, 1985, Gale testified that she returned to the apartment at 3519 South California almost every day to see respondent. (J. App. 73) Gale also admitted that sometimes she would be there late into the night and had probably slept there on occasion. Dorothy Jackson substantiated this by testifying that during this period, Gale did not come back to Ms. Jackson's apartment until 3:00 a.m. on at least three to five occasions. (J.App. 55)

At the hearing on the motion to quash arrest and suppress evidence, Gale testified that she left her key at the apartment on California on July 1, 1985 when she moved in with her mother, (J.App. 64) and when respondent beat her up on July 26, 1985, she took the key from the dresser without his knowledge or permission. However, at the preliminary hearing held on September 11, 1985, Gale testified that respondent had given her the key to the apartment. (J.App. 80) It is noteworthy that Gale admitted that subsequent to the beating and respondent's arrest on July 26, 1985, respondent came through her friend's window, used his fist to hit her in the face with such force that Gale's cheekbone was fractured in four places. (J.App. 82) Gale also admitted that she was afraid of respondent when he gets mad. (J.App. 84)

When these facts are analyzed in light of this Court's decision in *Matlock*, it is clear that Gale possessed common authority over the apartment at 3519 S. California. From December of 1984 to June 30, 1985, Gale unquestionably possessed common authority. By moving out temporarily, Gale did not lose her common authority over the apartment. Gale did not abandon the premises. Gale admitted that every worldly possession besides some clothing, remained at the apartment. Indeed, Gale was at the apartment almost every day between July 1 and July 26. Dorothy Jackson's testimony corroborates this point. In describing the July 1 move, Dorothy testified that Gale told her that the purpose of returning to her mother's home was to toilet train one child and wean the other from her bottle because respondent was annoyed with their lack of training. After the girls were trained, Gale was to return to her apartment. (J.App. 41) When Gale



moved into her mother's home, she just took some clothing, "whatever she could grab real fast." (J.App. 39) This was hardly a permanent move, nor had Gale abandoned her interest in the premises on California Avenue. Gale's stay at her mother's home was intended to be temporary, a fact supported by Gale's frequent visits to "her" apartment. Gale's use of the key to enter the apartment on July 1, 1985 and July 26, 1985 further evidences not only Gale's mutual use, but her control over the premises. The story about how Gale came to possess that key differed substantially from her previous court reported testimony.

It is clear that Gale possessed a sufficient relationship to the premises to give valid consent to enter to the police officers. It is only through a misapplication of *Matlock* that the Illinois Appellate Court and the trial court were able to reach a contrary conclusion. Indeed, the Illinois Appellate Court was guided by the precise property concepts of which the *Matlock* court expressed its disapproval. In finding that Gale Fisher lacked a sufficient relationship to the premises and thus lacked actual authority to give valid consent, the Illinois Appellate Court relied on these specific factors:

> (1) Gale's name was not on the lease and she did not contribute to the rent;
>
> (2) 3519 South California was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee;
>
> (3) She did not have access to the apartment when respondent was not there and, like a guest, she only had access to the apartment when respondent was present;

(4) She never brought people over to the apartment;

(5) She moved her clothes, and more importantly, her children to her mother's residence.

In relying on these factors the Illinois Appellate Court not only violated both the spirit and intent of this Court's decision in *Matlock*, but ignored its precise dictates. First, the fact that Ms. Fisher's name did not appear on the lease and that she did not contribute to the rent are the precise type of property concepts that this Court condemned in *Matlock*. Many people do not contribute monetarily to rent payments, nor have their name on the lease. Nevertheless, they would be quite alarmed and appalled to discover that they cannot give valid consent to enter their places of residence.

Second, the facts of this case also show that 3519 South California was Gale's permanent residence. Gale moved to her mother's home on a temporary basis taking with her whatever she could carry. The fact that all her possessions remained at 3519 S. California is strong evidence that this was still her permanent residence. Technically, when Gale moved in with her mother, 3519 S. California was no longer her "exclusive residence." However, many people have more than one residence. For example, it is common for people to own summer homes or maintain a permanent residence in the suburbs and an apartment in the city. Furthermore, the evidence belies the finding that Gale was an infrequent visitor. She admittedly went to 3519 South California almost every day during the period between July 1 and July 26 and even spent the night.



Third, contrary to the conclusion of the Illinois Appellate Court, Gale probably did have access to the apartment when respondent was not there. Indeed when she moved her clothes out of the apartment, she entered with a key. She also used her key on July 26, 1985, which she had initially testified at the preliminary hearing respondent had given her. On both of these occasions, these entries were witnessed by Dorothy Jackson.

Fourth, the fact that Gale never brought friends to the apartment is not dispositive. There was no testimony that she was prohibited from doing so.

Finally, Gale moved her children and three baggies of clothing for what was supposed to be a short period of time. The move was not intended to be permanent.

In *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (1978), the New Mexico Court of Appeals was faced with facts similar to those of the instant case. In *Madrid*, the Court of Appeals, in reliance on *Matlock*, found that defendant's wife possessed common authority over the premises and reversed the suppression order that had been entered by the trial court.

Defendant, Eugene Madrid, and his wife were married in 1972, moved into the Morgan Street residence in 1974 and lived there together until November, 1976. When marital difficulties arose, Mrs. Madrid moved out of the residence in question and moved in with her mother. As in the case at bar, Mrs. Madrid took most of her clothing with her, but left property in which she possessed a legitimate interest, including a television set,

automobile and bedroom furniture. She also left a bedroom set that she owned herself and a box of "unidentified things" that belonged to her daughter. In addition, defendant paid the rent and all bills at the residence. Finally, both defendant and his wife possessed keys to the residence.

In *Madrid*, defendant's wife consented to an entry and search of defendant's residence. Defendant's wife met the officers at the residence, unlocked the back door with a key and told the officers that they could go inside and look around. *Id.* at 595. Just as in the case at bar, the question of the validity of Mrs. Madrid's consent arose due to the fact that she was not living at the residence at the time she gave consent.

On the basis of these facts, the *Madrid* court found that Mrs. Madrid possessed common authority under *Matlock*, and thus gave valid consent. Unlike the Illinois Appellate Court, the *Madrid* court was faithful to this Court's directives not to rely on property concepts when assessing third party consent. Indeed the court stated: "The question of . . . 'common authority' is not to be determined on the wife's property interest in the premises." *Id.* at 596. Thus, the court recognized that under *Matlock*, a third party may validly consent if he or she possesses common authority or other sufficient relationship to the premises. *Id.* at 597.

The *Madrid* court found that Mrs. Madrid possessed a sufficient relationship to the premises. Unlike the Illinois Appellate Court, the *Madrid* court found that the wife's possession of the key justified an inference of unrestricted access. *Id.* at 597. The court also focused on the



fact that Mrs. Madrid left property on the premises in which she had a legitimate interest. Mrs. Madrid had moved out of the residence over five months prior to the search. In the case at bar, Gale had left for only twenty-five days, had spent substantial amounts of time at 3519 South California and in fact spent the night there on several occasions.

In *Sullivan v. State*, 716 P.2d 684 (Okl. App. 1986), the Oklahoma Court of Criminal Appeals reached a similar conclusion when confronted with analogous facts. In *Sullivan*, defendant Sullivan and his common-law wife, Ruth Leber, shared a rental house together until April 7, 1983. On that date, due to marital problems, Leber moved most of her belongings and those of her children out of the house and into her mother's home. However, Leber did leave some things at the residence that she planned to pick up at a later time. Moreover, she retained a key to the residence that she used to allow the officers to enter on the following day.

Defendant was subsequently arrested following an altercation with his common-law wife. The following day, Leber met the officers at the residence, produced a key and allowed the officers access to the house. Again, just as in *Madrid*, defendant's wife was not living at the residence at the time she gave consent.

Based on these facts, the *Sullivan* court held that Leber possessed common authority under *Matlock*. The court emphasized that Leber had retained a key to the residence and continued to exercise common authority.

The court stated that Leber's common authority was evidenced by her intent to return later, at her leisure, and remove her remaining property.

The facts which evidenced Gale Fisher's actual authority are equally compelling.[7] The Illinois Appellate Court erred in concluding that Gale Fisher could not give valid consent under *Matlock*, and in relying on property concepts in determining whether common authority existed. Accordingly, the Illinois Appellate Court's decision should be reversed.

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[7] See: *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982); *United States v. Long*, 524 F.2d 660 (9th Cir. 1975); *United States v. Lawless*, 465 F.2d 422 (4th Cir. 1972).



## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County for further proceedings.

Respectfully submitted,

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